

OCT 31 2011

JULIA C. DUBLEY, CLERK
BY: 
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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

UNITED STATES OF AMERICA,)	Civil Action No. 5:09-cr-00025
)	
v.)	<u>FINAL ORDER ADOPTING REPORT</u>
)	<u>AND RECOMMENDATION</u>
LEANDER LEE KELSEY, JR..)	
)	By: Samuel G. Wilson
)	United States District Judge

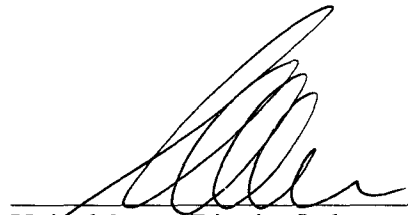
Leander Lee Kelsey, Jr. filed a motion to vacate, set aside, or correct sentence, pursuant to 28 U.S.C. § 2255, alleging that counsel provided ineffective assistance by failing to request a jury instruction as to a lesser included offense and by failing file a notice of appeal upon Kelsey's request. By order dated September 9, 2011, the court referred the matter to United States Magistrate Judge James G. Welsh for an evidentiary hearing. The Magistrate Judge conducted a hearing on September 14, 2011. The Magistrate Judge has filed a Report and Recommendation pursuant to 28 U.S.C. § 636(b)(1)(B), concluding that Kelsey has met his burden of proving counsel's assistance was ineffective as it related to his failure to file a notice of appeal upon Kelsey's request. The Magistrate Judge recommends that the court grant Kelsey's § 2255 motion, vacate Kelsey's criminal Judgment Order, re-enter the judgment, and dismiss Kelsey's remaining claim. Neither party has filed objections to the Magistrate Judge's Report and Recommendation. Having reviewed the Report and Recommendation and pertinent portions of the record, the court agrees with the Magistrate Judge's recommendation.

Accordingly, it is hereby **ORDERED** and **ADJUDGED** as follows:

1. The Report and Recommendation (Docket No. 128) is **ADOPTED**;
2. Kelsey's motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255 (Docket No. 102) is **GRANTED**;

3. The government's motion to dismiss (Docket No. 108) is **DENIED**;
3. The judgment order in Kelsey's Criminal Case No. 5:09cr00025-1 (Docket No. 97) is **VACATED**;
4. The Clerk of the Court shall **PREPARE** and **ENTER** a new Judgment Order in Case No. 5:09cr00025-1, in every respect the same as the previous Order, except as to date of entry;
5. Upon entry of the new Judgment Order, the Clerk of the Court shall **ENTER** a notice of appeal on behalf of Kelsey¹;
6. Kelsey's ineffective assistance of counsel claim concerning jury instructions is **DISMISSED without prejudice**²; and
7. This matter is **STRICKEN** from the active docket of the court.

ENTER: This 31st day of October, 2011.



United States District Judge

¹ Petitioner is advised that he may make a motion in the Court of Appeals for the Fourth Circuit to have new counsel appointed to assist him with his appeal in Criminal Case No. 5:09cr00025-1.

² The United States Court of Appeals for the Fourth Circuit, in United States v. Killian, 22 F. App'x. 300 (4th Cir. 2001), instructed that when a district court grants a § 2255 motion due to counsel's failure to file a direct appeal despite petitioner's request, the court may not consider the merits of any of the remaining claims in the § 2255 motion, but must instead dismiss those claims without prejudice.